IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1270~~ 70-70

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE SPERRY AND HUTCHINSON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Whether the authority of the Federal Trade Commission to challenge "unfair methods of competition" and "unfair or deceptive acts and practices" under Section 5(a)(1) of the Federal Trade Commission Act has been curtailed by the court of appeals' opinion.[1]

Statement

Respondent The Sperry and Hutchinson Company (hereinafter sometimes called "S&H") submits the following supplementary statement of facts which are deemed important.

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[1] Petitioner has set forth two "questions presented," while respondent states only one (a modification of petitioner's first question). The reason respondent omits petitioner's second question is that that question is not in fact present in this case (see pp. 9-10 *infra*).

As appears from the summary of the facts set forth in the opinion of the court of appeals (App. 2a-5a) and in the petition for certiorari (pp. 4-6), S&H is engaged in the business of providing its trading stamp service to retail merchants who are licensed by S&H to issue its trading stamps to their customers. In the words of the court below: "The purpose of S. & H.'s service is to enable its licensees to increase and to maintain their sales by attracting customers and inducing those customers to return, again and again, until they have collected enough stamps to secure the redemption articles of their choice" (App. 4a).

Throughout S&H's history non-licensed retailers and stamp brokers have attempted to acquire S&H stamps from others in order to issue them to their own customers (J.A. III, 333; App. 104a). Notwithstanding petitioner's theories that such commercial trafficking in S&H trading stamps does not injure S&H, the plain fact is that if S&H could no longer obtain judicial relief from such trafficking in its stamps, the stamps would no longer serve their essential purpose of attracting customers to the retail store which is licensed to issue them. If the competing merchant across the street were free to offer to redeem the stamps in his own merchandise or to apply the stamps as down payment on goods purchased,[2] the incentive for the S&H licensed merchant to use S&H stamps would disappear. Not only would the stamps then lose their promotional purpose of encouraging continued patronage; they would become an instrument to introduce the customer to the store of the competitor across the street who would be redeeming them (J.A. III, 210, 250-51).

As the hearing examiner found:

[2] For examples of such practices, see App. 104a-105a.

> "Moreover, as a matter of common knowledge, it must be recognized that since the promotional service sold by respondent is one designed to bring customers into a licensee's store by the issuance of a popular S&H stamp, this design cannot be realized in the long run if a customer can get the popular S&H stamp at an exchange by surrendering a different stamp secured at some other store. . . ." (J.A. I, 61).

Continuous unrestricted redemptions and other dealings in S&H trading stamps would seriously injure and could ultimately destroy the trading stamp business. A finding to this effect was made by the examiner on the basis of the evidence:

> "If stamps can be traded, the attraction of the customer to a licensee's store caused by the issuance of S&H stamps is destroyed. The customer can trade anywhere and exchange other stamps for S&H. Thus the licensee does not get what he pays for" (J.A. I, 76).

The examiner concluded that S&H's "restriction [on transferability] is inherently essential to carrying out the purpose of the promotional scheme" (J.A. I, 61).

The irreparable injury to S&H resulting from unauthorized redemptions and use of its stamps, and the unfair competition which is inherent in such trafficking, has been recognized for more than 60 years by courts throughout the country which have granted equitable relief against the unauthorized use of trading stamps (J.A. II, 588-92).

The Commission held that S&H's policy had "restrained trade and had severe anticompetitive effects in the marketplace" (App. 112a). The Commission said that its task was "to determine whether or not there has been or may

be an impairment of competition" (App. 111a) and concluded that S&H had been "engaged in limiting competition" (App. 118a). That conclusion was based on its findings that S&H's conduct had "tended to eliminate the operations of a whole class of businessmen" (*i.e.*, trading stamp exchange operators) (App. 114a) and that it "restrained trade at the retail level" (*id.*) by preventing retailers in competition with S&H licensees from redeeming or exchanging S&H stamps.

The court of appeals set aside the Commission's order. While agreeing that the injunctions issued by state and federal courts had "no doubt injured the business of the traffickers," the court stated that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. 6a). The court held that to be "unfair" within the meaning of Section 5 of the Federal Trade Commission Act an allegedly anticompetitive practice "must be more than a mere restraint of competition. . . . The Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. 8a).

Argument

A writ of certiorari is sought in this case on the sole ground that the opinion below raises important questions of federal law which should be settled by this Court. It is respectfully submitted that the opinion below does not raise any new or significant issue with regard to the interpretation of Section 5.

I.

The Opinion of the Court of Appeals Does Not Curtail the Broad Powers of the Commission Under Section 5.

The first "question presented" submitted by the petitioner is whether Section 5 is "limited to conduct which violates the letter or spirit of the antitrust laws" (Petition, 2).

Obviously, Section 5 is not thus limited with respect to all of its aspects, and the opinion of the court below does not so hold.

It is well established that the Commission has the power under Section 5 to enjoin acts and practices (1) which are *deceptive*, such as misleading advertising, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); (2) which are *inherently unfair*, such as the selling of merchandise by means of a lottery scheme, *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304 (1934); and (3) which unduly *restrict competition*, *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357 (1965).

The question presented for review to the court of appeals was whether S&H's conduct in restraining unauthorized persons from using S&H stamps constituted an undue restriction on competition. Thus, this case falls squarely within the third of the above categories. This was recognized by the court below when it prefaced its discussion of the legal problem before it with this statement:

> "The traffickers in S. & H. stamps have been enjoined forty-three times by state and federal courts. This

court action has no doubt injured the businesses of the traffickers. However, the Commission cannot rest its case solely on the determination that *injury to a competitor* exists" (App. 6a, emphasis supplied).

In this context, the court went on to state that the Commission should declare acts "unfair" only if they violate the antitrust laws or "the *spirit* of these Acts" (App. 7a) or "the *policy* or *spirit* of the antitrust law" (App. 8a). It is obvious that this statement by the court applies exclusively to acts or practices which are challenged by the Commission *on the ground that they unduly restrict competition.* Neither the Commission's findings nor opinion ever stated that S&H's institution of legal proceedings to halt unauthorized trafficking in trading stamps was deceptive or that it was inherently unfair within the meaning of *Keppel, supra.* Accordingly, conduct challenged by the Commission on the ground that it may be (1) deceptive or (2) inherently unfair is in no way affected by the court's decision.[3]

As the court below pointed out (App. 7a-8a), this Court has held that practices which are challenged by the Commission on the ground that they unduly restrict competition may be held to violate Section 5 even though they do not violate the antitrust laws *if* they have "the characteristics of recognized antitrust violations," *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357, 369-70 (1965), or if they constitute incipient antitrust violations or "conflict with the basic policies of the Sherman and Clay-

[3] Thus, the court's decision would have no bearing upon the Commission's efforts to protect consumers against conduct alleged to be inherently unfair, such as its proposed rule dealing with negative option plans employed by book and record clubs, referred to at page 16 of the petition.

ton Acts," *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

Applying this test in its broadest form, the court below stated that with regard to conduct alleged to be unduly restrictive of competition the "Commission should at least determine that the practice violates the policy or spirit of the antitrust law" (App. 8a). This statement of the court does not narrow the authority of the Commission. It applies the rules developed by this Court and gives the Commission extremely broad scope, for many anticompetitive practices may be said to violate "the policy or spirit of the antitrust law" even though they do not violate the laws as such (App. 8a). There is no basis whatsoever for petitioner's statement (Petition, 11) that the court's opinion reflects a return to the doctrine of *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920). In fact, far from resurrecting *Gratz*, the court expressly followed *Brown Shoe* (App. 7a-8a) which buried *Gratz*.

The court below held that the facts in the record in this case did not support a finding by the Commission that S&H's actions in seeking judicial relief against traffickers in trading stamps violated the policy or spirit of the antitrust laws. The dissenting judge disagreed, indicating that: "There should be little doubt that with the benefit of the spirit of the Sherman Act, the Commission acted within the scope of Section 5 of the FTC Act" (App. 16a).

The question whether the majority of the court below or the dissenting judge was correct in the application of the law to the facts of this case is of no significance in considering whether a writ of certiorari should be granted, for this question is not designated in the petition as a "ques-

tion presented," nor is it fairly comprised therein, in accordance with Supreme Court Rule 23(1)(c). Accordingly, that is a question which is not to be considered by this Court.

The petition reflects disagreement with the analysis of the record by the court below, which decided the case solely on the basis of whether S&H's conduct constituted an undue restriction on competition. Even if the question whether the court properly analyzed the record had been presented in the petition, it would not bring to this Court an important matter of federal law to determine. And the Commission's own treatment of the case provided ample reason for the court below to limit its decision to an analysis of whether S&H's conduct violated the spirit or policy of the antitrust laws. The Commission repeatedly emphasized that it was deciding the matter on the basis of whether S&H had restrained competition.[4]

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[4] In its opinion, the Commission began its discussion of the law with a quotation of Section 5(a)(1) and immediately thereafter sought definition of its powers in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948), *Atlantic Refining, supra, Brown Shoe, supra,* and *Luria Brothers Co.* v. *Federal Trade Commission*, 389 F.2d 847 (3d Cir. 1968), all decisions dealing with the effects of unfair acts upon *competition* (App. 77a-79a). The Commission then said that it would "look at all the facts of record to determine if *competitive activity has been or may be impaired*" (App. 79a). In its subsequent analysis, it looked at the "possible harm to *competition*" caused by S&H's practices and their "*competitive* effects" (App. 109a). It considered the "broad *competitive* questions presented" (App. 111a); said that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of *competition*" (App. 111a); and it then turned "to the evidence which the record may contain as to the *competitive* effects of the restrictions . . ." (App. 112a). The Commission stated that S&H's practices "restrained trade and had severe *anti-competitive* effects in the marketplace" (App. 112a) for the reason that "trading stamp exchanges suffered a serious loss of business

II.

The Second "Question Presented" by Petitioner Is Not in Fact Present in This Case, for the Court Below Did Not Hold or Suggest That Court Decisions Upholding S&H's Conduct Foreclose the Commission From Finding That Such Conduct Violates Section 5.

Contrary to petitioner's inference in its second "question presented" (Petition, 2), the decision of the court of appeals neither holds nor suggests that "decisions under state law in private litigation . . . foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5."

In exploring its second "question presented", petitioner states:

> "The court below relied heavily on decisions under state law in which S&H obtained injunctions against stamp exchanges on theories of 'misappropriation of goodwill' or 'tortious interference with business relations.' See *e.g., Rance* v. *Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla.), certiorari denied, 382 U. S. 945 [1965]. By its emphasis on these decisions, the court appears to have rejected, or at least substantially limited, the

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(App. 113a) and the restraints upon unauthorized redeeming retailers *"restrained trade* at the retail level" (App. 114a). It said "[o]ur approach to the matter is to look first at the activity . . . and to determine whether such is *anticompetitive*" . . . and it found S&H's action "has adversely affected *competition*" (App. 117a). Thereupon, it pronounced its holding that S&H "engaged in *limiting competition* in the use of trading stamps and that its policies and actions *in this regard* are unfair and in violation of Section 5 of the Federal Trade Commission Act" (App. 118a). Thus, it was in the context of the effect of acts and practices upon competition that the proceeding was appealed to the court below.

Commission's exercise of its power when its action conflicts with state policy" (Petition, 13-14).

While the court below, in that part of its opinion which recited the facts of the case, noted that injunctions had issued against unauthorized users of trading stamps and that four states have statutes prohibiting trafficking in stamps (App. 5a-6a), nothing in the opinion supports the claim that the "court below relied heavily on decisions under state law in which S&H obtained injunctions." In fact, the court's opinion below, unlike petitioner's application for certiorari, did not cite a single one among the many reported decisions in which an injunction issued against traffickers. In these circumstances, there is no justification for petitioner's assertion that: "By its emphasis on these decisions, the court appears to have rejected, or at least substantially limited, the Commission's exercise of its power when its action conflicts with state policy."

As petitioner states (Petition, 14): "State policy may, of course, be a factor to be considered along with other aspects of public interest in reaching a decision under Section 5", citing *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission,* 263 F.2d 502 (4th Cir., 1959).[5] However, it is beyond dispute, given the Supremacy Clause of the Constitution, that court decisions interpreting state law do not and cannot "foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5."

For the foregoing reasons, it follows that the second "question presented" designated by petitioner is not in fact present in this case, and hence should be disregarded.

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[5] Indeed, the court in *Asheville Tobacco* actually said "should be considered," not "may" be considered (at 512).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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